No. 78-425

In the Supreme Court of the United States

OCTOBER TERM, 1978

P. C. PFEIFFER COMPANY, INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONERS

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONERS

v.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 27-28) is reported at 575 F.2d 79. The original opinion of the court of appeals (Pet. App. 30-55) is reported at 539 F.2d 533. The opinion of the Benefits Review Board in the *Ford* case (A. 41-45) is reported at 1 B.R.B.S. 367, and the opinion of the Benefits Review Board in the *Bryant* case (A. 93-98) is reported at 2 B.R.B.S. 408. The opinions of the administrative law judges (A. 20-40, 64-92) are not reported.

JURISDICTION

The judgment of the court of appeals on remand from this Court was entered on June 16, 1978. The petition for a writ of certiorari was filed on September 13, 1978, and was granted on November 27, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether "maritime employment" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act includes all marine terminal operations that are necessary to transfer cargo between land and water transportation.

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a) of the Act, 33 U.S.C. 903(a), provides:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT

1. Diverson Ford, an employee of petitioner P. C. Pfeiffer Company, was injured in the course of his employment at the Port of Beaumont, Texas, on April 12, 1973 (A. 22). On that day Pfeiffer assigned Ford to the job of fastening military vehicles onto

railroad flat cars for shipment inland. The military vehicles had arrived at the port several days earlier; they had been unloaded from a seagoing vessel, stored for a period of time on the dock, and then loaded onto the flat cars. Ford's work was thus the last step in transferring the cargo from sea to land transportation (Pet. App. 46; A. 24-25). Ford performed his work on an open concrete apron dock a few feet from the water's edge (A. 23-24).

Pfeiffer provides a variety of maritime services at the Port of Beaumont, including stevedoring, "warehousing," [1] and shipping agency services (A. 25-26). The employees in its stevedoring division and shipping agency may work on vessels docked in the port, but employees of its warehouse division do not (A. 26). Under Pfeiffer's practice and the rules of the unions representing Pfeiffer's employees, the work of

[1] Pfeiffer is not in the ordinary "warehousing" business, *i.e.*, storing goods for hire. Its "warehousing" is performed solely in and for the Port of Beaumont, and it comprises an ordinary full range of marine terminal operations (A. 8-9).

Typically, work in a port is divided between a stevedore or stevedoring contractor and a marine terminal operator. The stevedore is responsible for getting cargo on and off the ship, work that is performed by longshoremen in "stevedoring gangs." The marine terminal operator is responsible for the safe handling of the ship, the delivery and receipt of the ship's cargo, and all movement and handling of that cargo any place in the terminal shoreside of the point where the stevedoring gangs pick it up and deposit it. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 254-255 n.4 (1977); U.S. Department of Labor, Office of Workers' Compensation Programs Task Force Report, *Longshore and Harbor Workers' Compensation Program* 103-104 (1976).

removing cargo from vessels is allocated to members of the deep sea longshoremen's local unions, who work in Pfeiffer's stevedoring division. Once the cargo is set down on the dock, all further handling, including moving and loading it onto land transportation for further shipment inland, is allocated to members of the waterfront "warehousemen's" local union,[2] who work in Pfeiffer's warehouse division (A. 26, 29-30). Although Ford had on occasion worked as a member of a stevedoring gang in Pfeiffer's stevedoring division, he was working as a terminal worker in its warehouse division on the day of his injury (A. 24-25).

As amended in 1972, the Longshoremen's and Harbor Workers' Compensation Act extends benefits to any "employee" (33 U.S.C. 902(3)) who is injured on navigable waters or on an adjoining pier, wharf, terminal, or other adjoining area customarily used by an employer for loading or unloading vessels (33 U.S.C. 903(a)).[3] The term "employee" includes "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations" (33 U.S.C. 902(3)). The

[2] The "warehousemen" are a local affiliate of the International Longshoremen's Association. They work only as terminal workers for waterfront terminal operators such as Pfeiffer.

[3] The parties agreed, and the administrative law judge found, that Ford sustained his injury in an area that satisfied the maritime "situs" requirement of 33 U.S.C. 903(a) (A. 33-34).

administrative law judge who considered Ford's claim for compensation under the Act concluded that Ford was not engaged in either "maritime employment" or "unloading" a vessel at the time of his injury. He therefore ruled that Ford was not a statutory "employee" within the meaning of 33 U.S.C. 902(3) (A. 36). And because none of Pfeiffer's employees had unloaded the particular cargo on which Ford was working when he was injured, the administrative law judge ruled that Pfeiffer was not a covered "employer" for the purposes of Ford's claim (A. 37).

The Benefits Review Board reversed and held that Ford is entitled to benefits under the Act. The Board held that even though Ford was not denominated as a longshoreman, the work he was doing at the time of his injury constituted "longshoring operations," and Ford thus was a statutory "employee." Longshoring operations, the Board held, "include intermediate steps subsequent to unloading cargo, still in maritime commerce, from a ship and prior to its removal from the terminal for further transshipment" (A. 44). Because Ford was an "employee," and because Ford and his coworkers were engaged in their maritime employment in a concededly maritime situs, the Board held that Pfeiffer necessarily was an "employer" within the meaning of Section 2(4), 33 U.S.C. 902(4).

2. Will Bryant, an employee of petitioner Ayers Steamship Co., was injured in the course of his employment at Galveston, Texas, on May 2, 1973 (A. 69). Bryant worked at Ayers' marine terminal immediately adjacent to a pier in the Port of Galveston. At the time of his injury, Bryant was engaged in his regular job of unloading cotton from wagons for eventual shipment in seagoing vessels (A. 69-70). Bryant had from time to time worked as a "deep sea longshoreman" in the area, but at the time of his injury he had not done so for several years (A. 60).

Ayers is a shipping agency and terminal operator; it ships cotton from its terminal in the Port of Galveston (A. 50). When loads of cotton arrive at the Port of Galveston, they are delivered to inland compress warehouses. After baling, the cotton is taken from the inland warehouses by wagons to a pier "warehouse," such as the one where Bryant was injured.[4] "Cotton headers" such as Bryant then unload the cotton from the wagons and stack it in the pier warehouse. Employees denominated as "longshoremen" then move the cotton from the pier warehouse to seagoing vessels (Pet. App. 48).[5]

Ayers does not employ the "longshoremen" directly; it contracts with other employers for their services. But "cotton headers," such as Bryant, work directly for Ayers. Ayers' practice and the pertinent

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[4] The "pier warehouse" in which Ayers accumulates cotton for export, like the "warehouse" operations of Pfeiffer, is not a warehouse in the ordinary sense. As a terminal operator, Ayers makes no charge for storage of cotton at the pier warehouse for the first 15 days, by which time nearly all cotton has been shipped out (A. 59). The "warehouse" is in fact an ordinary marine terminal "transit shed."

[5] This second transfer of the cotton may occur immediately or may be delayed by as much as two weeks (A. 71).

union rules provide that cotton headers do not go aboard ships to store the cargo in the ships' holds; that work is reserved for those denominated as "longshoremen." The work of the "cotton headers" is concluded when the cotton is stacked in the pier warehouse for transfer onto the ships (A. 70-71).

The administrative law judge denied Bryant's claim for compensation under the Act, concluding that Bryant was not injured at a maritime situs, as defined in Section 3(a) of the Act, 33 U.S.C. 903(a), and that he was not a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902 (3). The warehouse in which Bryant was injured, the administrative law judge found, was "adjacent" to the pier but did not "adjoin" it, and it was therefore not within the statutory definition of a maritime situs (A. 76). Because the cotton came to rest in the warehouse before other workers began to transfer it to the vessels, the administrative law judge concluded that Bryant's work was not part of a "longshoring operation" within the meaning of Section 2 (3) of the Act (A. 87).

The Benefits Review Board reversed and held that Bryant is entitled to compensation under the Act. The Board noted that petitioners apparently had conceded that Bryant's injury occurred in a maritime situs (A. 95), even though the administrative law judge found otherwise. In any event, it held the administrative law judge's conclusion on this issue was erroneous. The warehouse in which Bryant was injured, the Board found, was part of the Ayers marine

terminal and was immediately adjacent to a pier that in turn adjoined navigable waters. And, as the parties had stipulated, the cotton stored in the pier warehouse was taken from the warehouse directly onto waiting vessels. Therefore, the Board concluded, the warehouse satisfied the maritime situs requirement of the Act because it was a "terminal * * * or other adjoining area customarily used by an employer in loading * * * a vessel" (33 U.S.C. 903(a)).

Bryant also met the statutory requirement of maritime status, according to the Board. Bryant was engaged in longshoring operations, the Board held, which "include all essential steps in the overall process of loading cargo" (A. 97). His duties were "an integral part of the continuous longshoring operation" (*ibid.*). Because the Board found that Bryant's job was "the first step in a longshoring operation which would eventually conclude at some future date with the placement of the cotton in the hold of a ship" (A. 98), the Board held that Bryant was within the reach of the statute, which was meant to include "all cargo handling operations performed on land within the confines of a terminal" (A. 97).

3. Petitions for review in both cases were consolidated by the court of appeals with petitions for review in three other cases. The court of appeals upheld the awards of compensation in both cases (Pet. App. 30-55).

In Ford's case, the court observed that the vehicles on which Ford was working at the time of his injury had come to rest after their arrival on the dock and

before they were loaded onto the railroad flat cars (Pet. App. 47). But the court rejected the "point of rest" theory of coverage proposed by petitioners. The court noted that petitioners apparently conceded that Ford would have been covered if his work were part of a continuous operation that began with the cargo's departure from a ship's hold; their contention amounted to a denial of coverage "because of a discontinuity in time created by the cargo's having been stored for a while along the shore" (*ibid.*). The court declined to adopt the "point of rest" theory and held instead that a shoreside worker such as Ford is covered under the Act if he is directly involved in longshoring operations, such as unloading a ship. The work Ford was performing at the time of his injury, the court held, "was evidently an integral part of the process of moving maritime cargo from a ship to land transportation" (*ibid.*). There was therefore an "ample basis" for the Board's determination that Ford was performing covered work.

In Bryant's case, the court agreed with the Board that the situs of Bryant's injury was a waterfront area customarily used by an employer in loading a vessel and that the maritime situs requirement was therefore satisfied (Pet. App. 49). The court also sustained the Board's determination that Bryant was performing the work of an "employee" within the meaning of the Act. Again rejecting the "point of rest" theory that had been applied by the administrative law judge, the court stated that Bryant indisputably would have been involved in "longshoring

operations" if, "instead of setting the cargo down, he had handed it to a 'longshoreman' for immediate loading on board a ship" (Pet. App. 49-50). The brief discontinuity in time created by the cotton's temporary storage, the court held, "did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship" (Pet. App. 50). On that basis, the court held that there was ample support for the Board's conclusion that Bryant was involved in longshoring operations and that he is therefore entitled to compensation under the Act.

4. Petitioners sought review in both cases. The Court vacated the judgments and remanded the cases to the court of appeals for further consideration in light of *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). 433 U.S. 904 (1977).[6] On remand, the court of appeals reaffirmed its judgments in a brief opinion (Pet. App. 27-28), holding that its prior resolution of the coverage issues presented in the two cases is consistent with the rationale of this Court's decision in *Caputo*.

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[6] The Court remanded a third case that had been decided in the same opinion of the court of appeals. *Director, Office of Workers' Compensation Programs* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977). The court of appeals adhered to its prior judgment in that case as well, and the Director has again petitioned for a writ of certiorari. *Director, Office of Workers' Compensation Programs* v. *Jacksonville Shipyards, Inc.*, No. 78-1178. That case involves the question whether the location where a particular injury occurred was a maritime situs.

SUMMARY OF ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, provides compensation to all persons injured in a waterfront area, if they fall within the statutory definition of "employees." That definition includes "any person engaged in maritime employment," "any longshoreman," and any "other person engaged in longshoring operations." A person falling within any one of these categories is an "employee" for the purposes of the Act and is entitled to compensation if he suffers a work-related injury on the waterfront.

The Benefits Review Board and the Director consistently have interpreted the terms "longshoring operations" and "maritime employment" to include all tasks performed by marine terminal employees that are necessary to transfer cargo between land and sea transportation. Under this interpretation, both Ford and Bryant are within the coverage of the Act.

This test is consistent with the statutory language and legislative history even though, as this Court pointed out in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), neither the statute nor the legislative history provides substantial assistance in determining the meaning of the pertinent statutory terms. In light of the traditional understanding that the work of longshoremen includes handling cargo on the waterfront, however, both Ford and

Bryant were engaged in "longshoring operations" and thus in a form of maritime employment.

This construction of the Act also is consistent with the Court's analysis in *Caputo*. There the Court held that workers who were unloading a container long after it had been removed from the vessel were engaged in "longshoring operations" even though they were working entirely on land. In addition, the Court refused to limit the coverage of the Act to persons handling cargo after it leaves its last point of rest on the dock in the loading process and before it reaches its first point of rest on the dock in the unloading process. Accordingly, even though Ford and Bryant worked on the shore and handled cargo only shoreward of the point of rest, they could nonetheless be engaged in longshoring operations and maritime employment within the meaning of the Act.

Petitioners' proposed test for coverage of cargo handlers is too narrow. Under that test, cargo handlers would be covered by the Act only if they were subject to being assigned to work on board a vessel in the course of their work. But by expanding the definition of navigable waters to include waterfront areas, Congress eliminated the distinction between work on board a vessel and work on the waterfront for the purposes of making coverage determinations. Petitioners' test would exclude from coverage all longshoremen and persons engaged in longshoring operations if their employer's practice or union jurisdictional rules did not provide that they would be

subject to assignment to work on board a vessel. That test would reintroduce into the Act the distinction between work on a vessel and work on a dock, the very distinction that Congress sought to eliminate when it amended the Longshoremen's Act in 1972.

The Board's construction of the Act is consistent with the principle that the Act is to be given an expansive interpretation, favoring coverage. Moreover, even if the Court regards the statute as ambiguous on the issue presented here, it should defer to the consistent interpretation of the statute by the Board and the Director since the amendments were enacted.

ARGUMENT

A PERSON EMPLOYED IN A MARINE TERMINAL IS ENGAGED IN "MARITIME EMPLOYMENT" WHENEVER HE IS PERFORMING TASKS NECESSARY TO TRANSFER CARGO BETWEEN LAND AND WATER TRANSPORTATION

A. Any Person Who Engages in "Maritime Employment" is an "Employee" Under the Act

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, provides that compensation shall be paid to all "employees" who satisfy the employment "status" test of Section 2(3), 33 U.S.C. 902(3), and who are injured during their employment in places that satisfy the maritime "situs" test of Section 3(a), 33 U.S.C. 903(a). Petitioners acknowledge that Ford and Bryant were injured in waterfront areas that satisfy the maritime

"situs" test (Br. 7 n.11) and that Pfeiffer and Ayers are "employers" within the meaning of the Act (Br. 28 n.62). It also is undisputed that Ford and Bryant were acting in the course of their employment at the time they were injured. This case therefore turns solely on the construction of the employment "status" test of Section 2(3).

Section 2(3) provides that a worker is an "employee" satisfying the status test if he is "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *." All persons engaged in "maritime employment" are covered. Congress did not leave that ambiguous term as the sole definition of the extent of coverage, however; Section 2(3) provides that any "longshoreman" and any "other person engaged in longshoring operations" are engaged in the sort of maritime employment to which the statute applies.

There are, in other words, three ways for a cargo handler to meet the status test of Section 2(3): (1) he can be a "longshoreman" (whether or not he is engaged in longshoring operations); (2) he can be a person "engaged in longshoring operations" (whether or not he is a longshoreman); or (3) he can satisfy the broader generic description of "maritime employment" (whether or not he is a longshoreman or is engaged in longshoring operations).[7]

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[7] We do not discuss in this brief the other occupations that satisfy the status test. Section 2(3) provides that the term "employee" also includes any "harborworker including a ship repairman, shipbuilder, and shipbreaker * * *."

In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), this Court explored in detail the background of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. See 432 U.S. at 256-260. The Court noted that before 1972 the Act had not covered maritime employees injured on land, even if they were involved in clearly maritime pursuits, such as loading or unloading a vessel. See *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). The 1972 amendments to the Act changed that rule by providing that longshoremen, persons engaged in longshoring operations, and persons engaged in other kinds of maritime employment are covered by the Act even if they are injured on land, as long as the injury occurs in an area used for maritime purposes. See 432 U.S. at 261-265.

The Court concluded in *Caputo* that the terms "longshoreman," "longshoring operations," and "maritime employment" should be understood in light of the broad language of the 1972 amendments, which "suggests that we should take an expansive view of the extended coverage." 432 U.S. at 268. The term "maritime employment" was not meant as a restriction on coverage or meant to be limited to the specific subcategories of employment listed in the definition. Instead, as the Court stated in *Caputo*, "the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations" (432 U.S. at 265 n.25), even though the Court found it unnecessary in *Caputo* to look beyond those subcategories.

The legislative history of the 1972 amendments, although brief,[8] makes it clear that "maritime employment" includes more than the specific subcategories named in the definition of "employee."[9] Yet although the pertinent portions of the committee reports provide examples of some kinds of employees who would be covered under the amended Act and some kinds who would not, they stop short of supplying a definition of the governing terms used in the definition of "employee" or a general principle of construction for the definition. The "typical example" of shoreward coverage provided in the reports[10] "clearly indicates an intent to cover those workers

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[8] There was very little debate on the 1972 amendments in either the House or the Senate, and what debate there was focused on other provisions of the bill. See 118 Cong. Rec. 36265-36274, 36376-36396 (1972). The pertinent portions of the House and Senate Reports consist of a discussion less than two pages long entitled "Extension of Coverage to Shoreside Areas," which appears in identical form in both reports. See S. Rep. No. 92-1125, 92d Cong. 2d Sess. 12-13 (1972) ("S. Rep."); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972) ("H.R. Rep.").

[9] See, *e.g.*, S. Rep. 13; H.R. Rep. 10-11 (both of which state that the bill provides coverage to longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers "and other employees engaged in maritime employment" other than masters and members of the crews of vessels); S. Rep. 16 (the definition of "maritime employment" includes each of the subcategories of employment and "does not exclude other employees traditionally covered" by the Act); see also H.R. Rep. 14.

[10] S. Rep. 13; H.R. Rep. 10-11. See also *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 266 n.27.

involved in the essential elements of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." 432 U.S. at 266-267. This is typically the work of a stevedoring gang. On the other hand, the reference in the reports to "employees whose responsibility is only to pick up stored cargo for further trans-shipment" (S. Rep. 13; H.R. Rep. 11) indicates that "employees such as truck-drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered" (432 U.S. at 267); see also 432 U.S. at 275 n.37. The reports also state that persons performing purely clerical tasks and not engaged in the handling of cargo are excluded from coverage. S. Rep. 13; H.R. Rep. 11. See 432 U.S. at 267. But, as the Court observed, although the discussion in the reports is useful for "identifying the outer bounds of who is clearly excluded and who is clearly included, it does not speak to all situations" (432 U.S. at 267; footnote omitted). In particular, the legislative history is silent on the question whether coverage extends to persons such as Ford and Bryant who, like the two claimants in *Caputo*, were "engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading" (*ibid.*).[11]

[11] Bryant's case involves the loading rather than the unloading phase of the longshoring operation, but that makes no difference in the analysis.

B. The Board and the Director Consistently Have Defined "Maritime Employment" to Include All Employees Engaged In Handling Cargo on the Waterfront

The Benefits Review Board found that both Ford and Bryant were engaged in "longshoring operations" and thus in "maritime employment" within the meaning of Section 2(3) (see A. 44, 97). The Board defined "longshoring operations" to include all tasks that are an integral part of the "overall process" of loading or unloading cargo at a marine terminal, *i.e.*, of transferring it between a truck or rail car and a vessel. Under the Board's construction of the 1972 amendments, the Act covers all persons who remove cargo from a ship, transfer it, check it, load or unload containers, and place cargo in the possession of a consignee (or the consignee's agent) for overland carriage. When cargo is arriving at the waterfront, the same principles apply; once the cargo has left the possession of the highway or rail carrier, the Act covers all subsequent cargo handling activities until the cargo is safely aboard ship. Any person who participates in the risky task of cargo handling on the waterfront is engaged in "maritime employment," whether or not his job is locally called "longshoreman." At the urging of the Director, the Board has consistently taken this position since it was created by the 1972 amendments.[12]

[12] See, *e.g.*, *Avvento* v. *Hellenic Lines Ltd.*, 1 B.R.B.S. 174 (1974); *Coppolino* v. *I.T.O. Corp.*, 1 B.R.B.S. 205 (1974); *Scalmato* v. *Northwest Marine Terminal Co.*, 1 B.R.B.S. 461 (1975); *Dellaventura* v. *Pittston Stevedoring Co.*, 2 B.R.B.S.

The position taken by the Director and the Board is consistent with the common understanding of the

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340 (1975), affirmed, 544 F.2d 35 (2d Cir. 1976), affirmed *sub nom. Northeast Marine Terminal Co.* v. *Caputo, supra*; *Cabrera* v. *Maher Terminals, Inc.*, 3 B.R.B.S. 239 (1976), affirmed, 547 F.2d 1162 (3d Cir. 1977), vacated and remanded, 433 U.S. 905 (1977), reaffirmed on remand, 564 F.2d 90 (3d Cir. 1977); *Avena* v. *Pittston Stevedoring Corp.*, 4 B.R.B.S. 556 (1976); *Makoc* v. *Universal Terminal & Stevedoring Corp.*, 5 B.R.B.S. 3 (1976); *Fanelli* v. *Universal Terminal & Stevedoring Corp.*, 6 B.R.B.S. 51 (1977); *Perez* v. *Sea-Land Service, Inc.*, 8 B.R.B.S. 130 (1978).

The Board's construction of the term "longshoring operations" has been adopted by three of the six deep-water circuits and rejected in only one. In addition to the court below, the Third and Fourth Circuits have accepted the Board's analysis, see *I.T.O. Corp.* v. *Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977); *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976), while only the Ninth Circuit has rejected it. *Cargill, Inc.* v. *Powell*, 573 F.2d 561 (1977), petition for cert. pending, No. 77-1543. The Third Circuit has in fact gone beyond the Board's test, holding that the Act applies to the limits of admiralty jurisdiction. See *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs, supra*, 540 F.2d at 636-637.

Most of the commentators have agreed that the Board's test is the better construction of the Act with respect to cargo handlers. See, *e.g.*, G. Gilmore & C. Black, *The Law of Admiralty* 429-430 (2d ed. 1975); 4 A. Larson, *The Law of Workmen's Compensation* §§ 89.42-89.43 (1976); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683 (1973); Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments*, 55 Texas L. Rev. 99, 117-120 (1976); Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage Under the 1972 Amendments*, 9 J. Mar. L. & Com. 33, 53-54 (1977); contra, Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act*, 41 Ins. Counsel J. 63 (1974).

kind of work that constitutes "maritime employment" in general and "longshoring operations" in particular. As Congress was aware, longshoremen traditionally have performed many tasks that do not require them to shuttle between land and water. This is true not only with respect to containers and other modern cargo handling devices, to which Congress adverted in the Committee reports (S. Rep. 13; H.R. Rep. 11), but also with respect to traditional break-bulk cargo loading and unloading.

In the landmark case of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), for example, the state statute under consideration defined longshore work as the loading or unloading of cargos "or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." New York Laws of 1914, ch. 41, § 2(10). The Court in *Jensen* struck down the New York statute as applied to injuries taking place on the navigable waters in the course of such work, within the exclusive admiralty jurisdiction of the United States, but nothing in *Jensen* or later decisions suggests that the Court or Congress understood longshoring operations to be restricted to work aboard vessels or even to the immediate tasks of loading and unloading vessels.

The board conception of the work of the longshoreman was shared by Congress at the outset of the process that led to the passage of the Longshoremen's and Harbor Workers' Compensation Act in 1927. Congress originally attempted to authorize states to extend their own statutes to apply to maritime ac-

cidents, a course it selected in part because (H.R. Rep. No. 639, 67th Cong., 2d Sess. 2 (1922); emphasis added):[13]

> The work of the longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. *Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not.*

Recent judicial decisions, too, have recognized that the traditional work of longshoremen may involve more than the simple loading or unloading of ships. See *International Container Transport Corp.* v. *New York Shipping Association*, 426 F.2d 884, 886 (2d Cir. 1970):

> Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of

[13] This report accompanied the bill that was eventually enacted as the Act of June 10, 1922, ch. 216, 42 Stat. 634, and held unconstitutional in *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924). See also *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. 40 (1927) (Statement of L. B. Clark, United States Bureau of Labor Statistics): "[T]he original endeavor in amending the judiciary act was to give the States control of the whole situation, the whole contract—the man on the dock, the man on the ship, the man on the bridge, or on the ladder or hanging in between."

> drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers.

See also *Humphrey* v. *International Longshoremen's Association*, 401 F. Supp. 1401, 1406 (E.D. Va. 1975), reversed on other grounds, 548 F.2d 494 (4th Cir. 1977).

Indeed, in the decision of this Court that most immediately generated Congress's extension of the Act's coverage in 1972, the Court recognized that much of the work of "longshoremen" is not "in the service of a ship," and that the appropriate uniformity of remedy for injured longshoremen therefore could not be achieved through the "unseaworthiness" remedy. See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 212-213 (1971).

In light of this traditional understanding of the scope of tasks that are considered longshoremen's work or "longshoring operations," and in light of the congressional purpose to provide a uniform program of coverage at adequate rates to waterfront workers, the Board and the Director properly have construed the term "maritime employment" to extend to all physical tasks performed by marine terminal employees that are required to transfer cargo between land and water transportation.

C. This Court's Analysis in *Caputo* Supports a Broad Construction of the Term "Maritime Employment"

Although it acknowledged that the statutory language and legislative history provide little guidance in applying the Act to waterfront cargo handlers,

the Court in *Caputo* nonetheless established a framework that significantly supports our position here.

First, the Court established that an employee may be engaged in "longshoring operations" within the meaning of the Act even if he does not work on board a ship. As the Court noted, Congress recognized that, because of the advent of modern cargo-handling techniques, much of the longshoreman's work that was earlier done on a vessel is now done on land.[14] 432 U.S. at 269-270. Containers, for example, may be loaded, or "stuffed," on shore and then placed by mechanical means on board a container ship without the need for many of the persons engaged in the loading process ever to board the vessel. Nonetheless, stuffing or stripping containers is part of the process of loading or unloading a vessel, and these tasks plainly are "longshoring operations" within the meaning of the Act, even if the employees doing the work never venture on board a ship. 432 U.S. at 270-271. Thus, the Court held that claimant Blundo, a checker who was engaged in checking and marking items as they were removed on shore from containers that had been unloaded from a ship several days earlier at another port, was engaged in "longshoring

[14] The Court cited a passage from the reports that reflected congressional awareness of the increasingly land-based character of longshore work: "It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore." S. Rep. 13; H.R. Rep. 10.

operations" within the meaning of the Act. 432 U.S. at 271.

Second, the Court firmly rejected the "point of rest" theory as a basis for fixing the limits of "longshoring operations" within the meaning of Section 2(3). Under that theory, longshoring operations would include only the portion of the unloading process that takes place before cargo reaches its first point of rest on the dock and only the portion of the loading process that takes place after the stevedoring gang picks up cargo from its last point of rest on the dock to load it into a ship's hold. The Court held that the point of rest theory is inconsistent with the purpose of the Act, because the Act plainly reaches unloading operations that occur after the cargo has first come to rest on the dock and loading operations that occur before the cargo has reached its last point of rest prior to its transfer onto the ship. 432 U.S. at 276. Thus, the Court refused to adopt a restrictive definition of "longshoring operations" that would limit that term to the immediate process of transferring cargo to and from the hold of a ship.

Applying these principles to the present cases strongly supports the results reached by the Board and the court of appeals. These principles make it evident, for example, that there is no distinction between Ford's status and Caputo's that should result in a difference in treatment under the Act. Caputo was engaged in conduct indistinguishable from Ford's at the time of the injuries. The Court found that the Act applied in Caputo's case because, whether or not

loading a consignee's truck with recently arrived maritime cargo constituted "longshoring operations," Caputo was a longshoreman by occupation and was subject on the same day to being assigned to activities that indisputably were longshoring operations.

Much the same situation obtained in Ford's case. The administrative law judge found that the jurisdictional line between work done by the longshoremen's local union and the warehousemen's local union was drawn at the first point of rest for cargo prior to its being placed into a ship's hold (A. 30). Work on the ship's side of the point of rest was done by employees assigned from the longshoremen's local union, while work done shoreward of the point of rest was done by "warehousemen." Because the Court in *Caputo* rejected the "point of rest" test as the governing boundary between maritime and non-maritime employment, however, it is clear that at least some work done by Port of Beaumont "warehousemen" was indisputably maritime in nature.[15] It might include, for example, stuffing or stripping containers, work that the Court held is part of "longshoring operations" (432 U.S. at 270-271). And because Ford and his fellow workers may be covered by the Act for some of their work, they are covered for all of it, so long as it is performed at a maritime situs. Any other rule would permit the shifting of coverage between state and federal systems, precisely the phenomenon that the 1972 amendments were designed to abolish (432 U.S. at 272-274).

Bryant's work in unloading cotton from dray wagons at the pier warehouse was an integral part of the overall process of loading a vessel, even though his work was done on the shore side of the cargo's last point of rest. Bryant's work, which involved moving the cotton to the location within the warehouse from which it was taken by other workers for direct transfer into a ship's hold, indisputably would be part of the loading process if longshoremen took the cotton directly from Bryant for immediate loading onto the waiting vessels, or if one group of workers did Bryant's job and then moved the cotton again from the pier to the vessels. But to contend that Bryant's work was not part of the loading process because the cotton was at rest in the warehouse for a period of time before it was transferred to vessels is to resurrect the point-of-rest and break-in-time tests that were rejected in *Caputo*. 432 U.S. at 271 n.33, 274-279.[16]

[15] The Court in *Caputo* stated that union membership does not govern the inquiry into whether the employee is engaged in longshoring operations or maritime employment. "The vagaries of union jurisdiction are unrelated to the purposes of the Act," the Court wrote. 432 U.S. at 268 n.30. Therefore, it is not conclusive in determining the coverage of the Act either that the local union through which Pfeiffer hired Ford was denominated a "warehousemen's" local rather than a "deep-sea longshoremen's" local or that the local was an affiliate of the International Longshoremen's Association.

[16] Contrary to the peculiar specialization reflected in Galveston cargo handling practices with respect to cotton, the typical waterfront terminal worker is subject to assignment within the course of a day to any cargo handling work other than that allocated to stevedoring gangs. Whether at a con-

D. Petitioners' Proposed Test for Coverage Is Inconsistent with the Purposes of the Statute and the Court's Analysis in *Caputo*

Before the administrative law judge, the Board, and the court of appeals petitioners argued that these cases were governed by the point-of-rest test. That test having been rejected in *Caputo*, petitioners now advance their alternative test for the coverage of the Act. This test, they contend, is faithful to the language and the legislative history of the Act as well as to the decision in *Caputo*. They suggest that a waterfront employee should be regarded as engaged

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tainer terminal, a dry or liquid bulk cargo terminal, or an ordinary break-bulk cargo facility, the terminal workers are normally subject to reassignment to a variety of tasks, including the land-transportation receipt and delivery operations involved in these cases. Among the tasks to which terminal workers typically may be assigned are stuffing or stripping containers, "palletizing" cargo, engaging in large-unit banding, and mixing bulk cargos in storage at the terminal to a ship's specifications and then conveying them through belts, blowers, or pipes to a spout in the ship's hold. See, *e.g.*, *Reese* v. *Weyerhaeuser Co.*, 8 B.R.B.S. 379 (1978); *Cabrera* v. *Maher Terminals, Inc.*, *supra*; *Mildenberger* v. *Cargill, Inc.*, 2 B.R.B.S. 51 (1975); U.S. Department of Labor, Office of Workers' Compensation Programs Task Force Report, *Longshore and Harbor Workers' Compensation Program* 103-104 (1976).

These tasks, to which terminal workers are subject to being assigned from day to day or even within a single day, include functions that are indisputably "longshoring operations" under *Caputo*. To construe the Act to reach some cargo handling operations in a marine terminal but not others would thus expose many terminal workers to the "shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274.

in "maritime employment" only if he is subject at the time of his injury to being assigned to work on board a vessel. For a number of reasons, this test is unworkable as well as unfaithful to the Court's decision in *Caputo*.

First, the test has no basis in the statutory language. Petitioners contend that the term "maritime employment" has always meant employment performed on navigable waters and does not include any work performed on shore. In support of this contention, petitioners cite several pre-1972 cases in which the Court held that employees injured on navigable waters could recover under the Longshoremen's Act, while employees injured on land could not. But in 1972 Congress abandoned the waterfront line established in *Southern Pacific Co.* v. *Jensen*, *supra*, and moved the Longshoremen's Act coverage ashore. If the concept of "maritime employment" has ever been limited to persons who spend at least some of their time on the water,[17] Congress abandoned that

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[17] The cases on which petitioners principally rely, *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953); *Nogueira* v. *New York, N.H. & H. R.R.*, 281 U.S. 128 (1930); and *State Industrial Comm'n* v. *Nordenholt*, 259 U.S. 263 (1922), may well stand for the proposition that all employment performed on the water is "maritime employment," but they do not suggest that "maritime employment" is limited to such work. The point of these cases, and the line of cases restricting the pre-1972 coverage of the Longshoremen's Act to injuries occurring over water, was that it was the location of the injury, not the maritime character of the work, that governed the coverage of the Act.

interpretation of the term in 1972. The statute identified shore-based workers such as shipbuilders as being engaged in maritime employment,[18] and it included a variety of locations on land within the definition of "navigable waters." See 33 U.S.C. 902(4) and 903(a). Therefore, even if petitioners are correct that maritime employment includes only employment on "navigable waters," all waterfront workers who work on piers, wharves, terminals and other areas adjoining navigable waters are engaged in maritime employment. The statute therefore contains no express or implied requirement that maritime employees be subject to assignment to work on board vessels.

Nor does petitioners' test draw significant support from the legislative history. Petitioners rely heavily on the last two sentences in the pertinent portion of the reports, which read as follows (S. Rep. 13; H.R. Rep. 11):

> Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

[18] Although the structure of the definition of "employee" in Section 2(3) does not make it clear that all of the kinds of workers listed in the section are meant to be varieties of "maritime employment," the legislative history makes it clear that that was the intention of the drafters. See S. Rep. 16.

Petitioners argue that by these two sentences the Committees meant to indicate that "maritime employment" was restricted to employment on the water. But again, Congress had just defined navigable waters to include piers, wharves, dry docks, terminals and other waterfront areas adjoining the water. Therefore, these two sentences are consistent with the view that maritime employment includes employment on navigable waters, as defined to include these waterfront areas. Only the last clause of the second sentence is inconsistent with this interpretation, and it is difficult to assign much weight to that clause, as the drafter appears simply to have ignored the expansion of the definition of "navigable waters" in Section 3(a) of the statute.[19]

Third, petitioners' proposed test is inconsistent with *Caputo*. As *Caputo* makes clear, longshoring operations need not involve work on board a vessel. Containers and other modern cargo-carrying devices can be loaded and unloaded by longshoremen who never leave the docks and are not subject to being assigned to work on a vessel. Even loading and unloading of break-bulk cargo can be done by longshoremen who are not subject to assignment on board vessels: one crew may work on board the ves-

[19] See S. Rep. 16; H.R. Rep. 14 (section-by-section analysis).

sel and another crew may work on the dock, but both are indisputably engaged in loading or unloading the vessel, and both are indisputably covered for their full employment by the Act.[20]

Fourth, petitioners' test subjects the coverage of the Act to the whim of the employer. This was a factor in the Court's rejection of the point of rest test in *Caputo*. See 432 U.S. at 276 n.38. Petitioners themselves acknowledge that "Congress did not intend for shipowners or stevedoring companies to be able to avoid the more liberal compensation benefits of the Longshoremen's Act by the expediency of moving maritime employment activities from the vessel onto the dock" (Br. 37 n.71). By the same token, an employer should not be able to defeat coverage under the Act for some of its employees simply by organizing its longshoring operations so that some workers are permanently assigned to work on the dock.

Finally, notwithstanding petitioners' insistence that their test would have the advantage of easy application, it appears that petitioners' test would raise as many questions as it would answer. Should the determination that a particular employee was "subject to assignment" to work aboard ship depend on whether the description of his job for a particular day subjected him to possible assignment aboard a vessel or whether his general employment subjected him to assignment aboard a vessel? For example, if stevedoring gangs are formed on a daily basis, and a worker is hired to do dock work on a day that a vessel is not in port, the worker would not be subject to being assigned to work on board a vessel on that day; yet he might well be assigned to shipboard work on the next day as a member of a stevedoring gang composed of the same persons with whom he had been working on the dock. Similarly, if the practice in the port is to hire longshoremen as terminal workers on some days and as members of stevedoring gangs on other days, would the worker not be covered by the Act on those days that he worked as a terminal worker unless terminal workers were subject to assignment aboard vessels? Would the answer be different if the practice at the port was to make up stevedoring and terminal-work gangs in the course of a day, so that a terminal worker not subject to assignment on board a ship in the mornings could be placed with a stevedoring gang in the afternoon and be subject to assignment aboard ship at that time? Far from leaving the field clear of difficulty, petitioners' test would pose serious line-drawing problems even in the narrow context of break-bulk cargo handling.

[20] This arrangement of stevedoring gangs is not merely hypothetical, as is illustrated by the example in Bryant's brief regarding the practice of unloading bananas in Galveston (Br. 12 n.2). One crew of longshoremen is permanently assigned to the vessel and another is permanently assigned to the dock. Under petitioners' test, the crew assigned to the dock would not be covered by the Longshoremen's Act, a result that is patently at war with the language and purposes of the Act and the decision in *Caputo*. See *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 277 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977).

In short, petitioners' test resurrects the *Jensen* line in an even more unsatisfactory form. While under *Jensen*, workers were covered only when they crossed the shoreline, under petitioners' test workers would be covered only if they were "subject to" crossing that line. That test would be as arbitrary as the *Jensen* test, without the advantage of its relative simplicity of application. In light of the difficulties that would be posed for the Director and the Board in administering the Act under petitioners' test, that test is not an appropriate substitute for the interpretation that the Director and the Board have developed in applying the Act to waterfront cargo handlers.

E. Any Ambiguity in the Statute Should Be Resolved in Favor of Coverage

1. *The Act is a remedial statute and should be liberally construed*

To the extent there is any ambiguity in the 1972 amendments, it should be resolved in favor of coverage. As this Court has held, the Act must be "liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). Courts applying this principle have held that "the broadest ground [the Act] permits of should be taken." *De Bardeleben Coal Corp.* v. *Henderson*, 142 F.2d 481, 484 (5th Cir. 1944), quoted with approval in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 130 (1962). In *Caputo*, as we have noted, the Court

underscored the broad language of the 1972 amendments and wrote that in light of that broad language and the remedial purposes of the Act, "we should take an expansive view of the extended coverage" (432 U.S. at 268). Accordingly, under the 1972 amendments as under the pre-1972 Act, any ambiguities that the Court may find in the statutory language and legislative history should be resolved by adopting an interpretation of the Act favoring coverage for the injured worker.

2. *The Court should defer to the consistent administrative interpretation of the Act*

The Act contains a presumption that disputed claims come within its coverage. Section 20(a), 33 U.S.C. 920(a). This Court has applied that presumption, and the associated principle that the views of the agency charged with the Act's administration are entitled to great deference,[21] in fashioning a rule that administrative decisions should be upset only on a showing of the clearest abuse. See, *e.g.*, *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 474 (1947); *Davis* v. *Department of Labor*, 317 U.S. 249, 256 (1942); *O'Keeffe* v. *Smith, Hinchman & Gryllis Associates*, 380 U.S. 359, 363 (1965). There has been no abuse here.

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[21] See *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961).

The Court also has held on numerous occasions that when a statute reasonably may be read in several ways, the agency charged with the administration of the statute may select a reasonable interpretation, and the courts will defer to its selection. See, *e.g.*, *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 13-14, 16-17; *Zenith Radio Corp.* v. *United States*, No. 77-539 (June 21, 1978); *NLRB* v. *Iron Workers Local 103*, 434 U.S. 335, 350 (1978). In the instant cases the Board has interpreted the Act from the beginning in a reasonable fashion, informed by its experience with different situations in different ports,[22] and its decision—concurred in here by the Director, who has the responsibility for the day-to-day administration of the Act—is entitled to deference.[23] There is a "reasonable legal

[22] The Court has recognized that work practices differ from port to port. *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 276 n.38. See note 16, *supra*. This case therefore calls for "awareness of the practical expertise which an agency normally develops, and * * * a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time." *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753 (Jan. 16, 1979), slip op. 14 n.20.

[23] Under Department of Labor Regulations, the Board has the responsibility for applying the Act to individual cases in formal proceedings, and the Director has general superintendence over the administration of the Act and its application in the overwhelming majority of cases decided informally. See Section 39, 33 U.S.C. 939; 20 C.F.R. Parts 701 and 702. Although the 1972 amendments abolished the system under which awards of deputy commissioners were reviewed initially by district courts, there is no indication in the amendments or their legislative history that the Board and the Director are entitled to less deference than the deputy commissioners. Indeed, since the 1972 amendments created a central and uniform system of administration to replace the several independent deputy commissioners, the Director and the Board should be entitled to greater deference. These cases present no occasion for consideration of whether the Board's view, the Director's, or neither, should be afforded deference where the Board and the Director disagree. Cf. *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976) (neither entitled to deference).

basis" (*Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*, 330 U.S. at 479) for the award of benefits to Ford and Bryant, and the awards therefore should be upheld.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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